

AMERICAN BUSINESS CORPORATIONS UNTIL 1860. By Edwin Merrick Dodd. Cambridge: Harvard University Press, 1954. Pp. 524. \$7.50.

It is fortunate that before the accident in which he lost his life, Professor Dodd had so far completed the manuscript of this work that his colleague, Professor Chafee, was able to finish the task. A valuable contribution to American legal history has thus been saved.

The introduction adequately explains what offhand seems to be a puzzling scope and organization of historical material. Why 1860? The answer is that the Civil War marked a significant cleavage in American economic history and that by that time American corporation law, both statutory and judge-made, had achieved considerable maturity and had pretty well charted the channel it was to follow. Moreover, the period from the Revolution to the Civil War presented a body of material not too indigestible. As to organization, there is definite logic, as there is in anything Dodd did, in opening with two chapters on American case law (1800-1830, 1831-1860), following with three chapters on Massachusetts legislation, and ending with the chapter comparing, in the matter of shareholder liability, the other New England states. A complete lego-historical coverage of the early era of American corporations would have required a survey of the many special and general legislative acts, as well as of the case law, of all jurisdictions. As to legislation, the task is hardly feasible for a single investigator, since the significance and pattern of legislation, so important in corporation law, can only be appreciated from a close detailed study of particular jurisdictions. Hence, Professor Dodd concentrated on the legislation of Massachusetts, both for reasons of that state's early industrial pre-eminence and for the availability to the author of primary source material. (He did not live to carry out his plan to include a similar treatment for New York.) The case law, on the other hand, by its very nature is far less provincial.

The two three-decade periods, 1800-1830, 1831-1860, of American case law, forming the first and second chapters, are each broken down into (a) the public law of business corporations and (b) the private law. In both spheres American jurists blazed a trail little aided by English precedent. In part, the public law questions were peculiarly American, arising from bases such as the contract clause of the Constitution and from federalism. English precedent was of little help to a court faced with the *Dartmouth College* case,¹ *McCulloch v. Maryland*,² or *Bank of the United States v. Deveaux*.³ The necessarily novel theorizing in such cases greatly influenced American law—*Deveaux* is perhaps the fountainhead of "disregarding the corporate entity." In Dodd's treatment of the "private" (i.e., intracorporate) aspects of corporation law in its infancy, we see the genesis and growth of such familiar friends as the entity theory, voting rights in the stockholder of record,

1. *Dartmouth College v. Woodward*, 4 Wheat. (17 U.S.) 518 (1819).

2. 4 Wheat. (17 U.S.) 316 (1819).

3. 5 Cranch. (9 U.S.) 61 (1809).

the impropriety of voting treasury shares, the common law of quorum requirements, proxy-voting, fiduciary duties of officers, pre-emptive rights, liability on stock subscriptions and the classic defenses to it, liability of shareholders for an assessment, nonnecessity of the seal for a corporate contract, the agency basis of corporate contract, powers of officers and directors, delegation by the board of directors, de facto officers, ultra vires, corporate tort liability, nature of corporate shares, and transfer of shares. All these growing pains were suffered by American courts without the guidance or consolation of English experience. Kyd's two volume work on corporations, published in 1794, dealt almost entirely with incorporated boroughs and other nonprofit corporations. Blackstone was no help. American legal talent displayed, Dodd shows us, inventive ingenuity and independence in constructing the law of corporations.

In the second three-decade period, we see a gradual erosion of the privileged position enjoyed by corporations as a result of the *Dartmouth College* case. One by-product of this erosion, under the state's Reserved Power, was the development of minority shareholders' rights. Out of eminent domain litigation of this period, the concept of the public utility corporation evolved. Tax questions began to arise. (Is it "double taxation" to tax corporate property and also the shares? Situs?) The foundations were laid, however clumsily, for coping with the problem of local activity of a foreign corporation. One notes that Maryland then as now took the lead in exercising jurisdiction over foreign corporations.⁴ Blackstonian notions of the effect of dissolution began to disappear, though not entirely. On the more "private" aspects of corporation law, this second period is less noted for judicial inventiveness than for its building upon foundations already laid in the first three decades. Needless to say, Dodd's exposition of this early American case law is done with the precision and analytic insight that one has come to expect in his writings.

At the third chapter, Dodd turns his attention to the legislative developments in the fifty year period, through 1830, in Massachusetts. Again he shows us American inventiveness in corporate matters as he painstakingly traces the pattern of evolving policies through numerous special acts of incorporation and an impressive number of statutes enacted for general application to corporations or to classes of corporations. Here, again, the early law makers found little English precedent. British businessmen apparently were far less corporate minded than Americans even in that day of special charters. Incorporated enterprise, for example, accounted for a good share of the dynamic American textile industry which by 1815 employed a capital of \$40,000,000 and 100,000 workers, Massachusetts alone having by then chartered 115 textile companies.⁵

4. P. 174. Cf. MD. ANN. CODE GEN. LAWS art. 23, § 88(d) (1951); *Compania de Astral v. Boston Metals Co.*, 107 A.2d 357 (Md. 1954).

5. P. 368.

From Dodd's chronological account of the charters granted by special acts of legislation—to banking, insurance, manufacturing, toll-bridge, turnpike, canal, river improvement, water, gas, and even, in a modest degree by 1830, railroad companies—one senses the spirit of the times in the interplay of corporation law and economic expansion. It is easy to smile from the sophisticated heights of a later century at the simple notions revealed in many early charters that a corporation's net profit was to be paid out in dividends. These charters illustrate the early restrictive attitude toward corporations in their limitations on capital, property, geographical range of activities, voting by big blocks of shares, and interlocking directorates.

Interspersed with the special acts of incorporation, Dodd presents, in chronological order, the many general acts pertaining to corporations. These are not to be identified with the general self-incorporation statutes so familiar to our day. Such self-incorporating statutes typically were the culmination of a period of experimentation with earlier legislation, special and general. The early general acts reflect the crystallization of views on matters of corporate law based on the experience with provisions written into special charters.

The legislative developments of the next three-decade period are treated in the fourth chapter. By and large, the trails had already been blazed by the legislative pioneers of the preceding period. But among the more notable developments of this era were railroad corporation law, the administrative control of banking and insurance corporations, and the beginning (for Massachusetts) of mergers and preferred stocks.⁶ This was also the era of the enactment (in other states as well) of self-incorporation statutes.

The two final chapters, dealing with the evolution of limited liability, first in Massachusetts and then in the other New England states, are fascinating. The student of the twentieth century not steeped in legal history may be surprised to learn that limited liability, which we have come to look upon virtually as a fundamental right of man, was not always considered, as Dodd so clearly brings out, an inherent attribute of corporateness or an unmixed blessing or even a necessary inducement, at least to entrepreneurs as distinguished from passive investors. Massachusetts attained industrial supremacy under a policy which freely granted charters but withheld limited liability. The ebb and flow of the sentiment for limited liability was most notable in the State of Maine, which within the period of thirty-six years swayed back and forth nine times in its policy on limited liability for manufacturing corporations. A somewhat similar oscillation occurred in other New England states, both in general acts and in the special acts of incorporation. And rumblings of these early conflicts persist today in certain areas, *e.g.*, the liability of a parent corporation for torts of its wholly owned subsidiary.

6. The general act of 1885 permitting manufacturing corporations to issue "general" and "special" stock may be the source of the term "preferred or special stock" in modern corporation statutes. See, *e.g.*, DEL. CODE ANN. tit. 8, § 151 (1954); MODEL CORPORATION ACT § 14 (Am. Bar Ass'n 1950) ("shares of preferred or special classes").

Professor Dodd has done a masterly job, despite the fact that his death prevented him from working out several other intended chapters. Besides the mass of judicial and legislative sources, including hundreds of special charters, he draws upon newspaper accounts, government reports, reports of conventions of the era, and many secondary sources. Except for the chapter on shareholder liability, his chronological organization prevents him from presenting an orderly evolution of the array of corporate law doctrines, but the book is all the better for the organization to which it adheres. He studies eras for their own sake, not as preludes to our newer, bigger and better world of corporation law. This outstanding piece of research, to which an outstanding student of corporation law has brought his profound learning, insight, and intellectual curiosity, should spark an increased interest in American legal history, a field that has too long been neglected by historians in favor of English legal history.

E.R. LATTY†

†Professor of Law, Duke University.